

1 BILL LOCKYER
2 Attorney General of the State of California
3 LOUIS R. MAURO
4 Senior Assistant Attorney General
5 CHRISTOPHER E. KRUEGER
6 Supervising Deputy Attorney General
7 SUSAN K. LEACH
8 Deputy Attorney General
9 ZACKERY P. MORAZZINI, State Bar No. 204237
10 Deputy Attorney General
11 1300 I Street, Suite 125
12 P.O. Box 944255
13 Sacramento, CA 94244-2550
14 Telephone: (916) 445-8226
15 Fax: (916) 324-5567
16 Email: Zackery.Morazzini@doj.ca.gov

17 Attorneys for Defendants Governor Arnold
18 Schwarzenegger and Attorney General
19 Bill Lockyer

20 IN THE UNITED STATES DISTRICT COURT
21 FOR THE NORTHERN DISTRICT OF CALIFORNIA
22 SAN JOSE DIVISION

23 **VIDEO SOFTWARE DEALERS and
24 ENTERTAINMENT SOFTWARE ASSOCIATION,**

25 Plaintiffs,

v.

26 **ARNOLD SCHWARZENEGGER, in his official
27 capacity as Governor of the State of California;
28 BILL LOCKYER, in his official capacity as
Attorney General of the State of California;
GEORGE KENNEDY, in his official capacity as
Santa Clara County District Attorney, RICHARD
DOYLE, in his official capacity as City Attorney for
the City of San Jose, and ANN MILLER RAVEL, in
her official capacity as County Counsel for the
County of Santa Clara,**

Defendants.

CASE NO. C 05 4188 RMW RS

**OBJECTIONS TO
PLAINTIFFS' REQUEST FOR
JUDICIAL NOTICE BY THE
GOVERNOR AND
ATTORNEY GENERAL;
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF**

Hearing: December 9, 2005

Time: 9:00 a.m.

Courtroom: 6

Judge: The Honorable
Ronald M. Whyte

1 Defendants Governor Arnold Schwarzenegger and Attorney General Bill Lockyer
 2 (collectively, the “State”) respectfully object to Plaintiffs’ Request for Judicial Notice, filed
 3 November 23, 2005, on the following grounds:

4 1. Plaintiffs’ Exhibit 3 to their Request is not properly subject to judicial notice under
 5 Rule 201 of the Federal Rules of Evidence. Exhibit 3 purports to be an incomplete portion of a
 6 transcript of court proceedings held on November 14, 2005, in a Northern District of Illinois
 7 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to
 8 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite
 9 the contents thereof for the truth of the matter asserted therein as providing evidentiary support
 10 for Plaintiffs’ present motion for preliminary injunction. (Pltfs.’ Reply, 6:12-16.);

11 2. Plaintiffs’ Exhibit 4 to their Request is not properly subject to judicial notice under
 12 Rule 201 of the Federal Rules of Evidence. Exhibit 4 purports to be an incomplete portion of a
 13 transcript of court proceedings held on November 15, 2005, in a Northern District of Illinois
 14 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to
 15 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite
 16 the contents thereof for the truth of the matter asserted therein as providing evidentiary support
 17 for Plaintiffs’ present motion for preliminary injunction. (Pltfs.’ Reply, 6:12-20; n. 6; 8:9-28;
 18 10:1-8.);

19 3. Plaintiffs’ Exhibit 5 to their Request is not properly subject to judicial notice under
 20 Rule 201 of the Federal Rules of Evidence. Exhibit 5 purports to be a declaration and attached
 21 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois
 22 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to
 23 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the
 24 truth of the matter asserted therein as providing evidentiary support for Plaintiffs’ present motion
 25 for preliminary injunction. (Pltfs.’ Reply, 7:17-22.);

26 4. Plaintiffs’ Exhibit 6 to their Request is not properly subject to judicial notice under
 27 Rule 201 of the Federal Rules of Evidence. Exhibit 6 purports to be a declaration and attached
 28 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois

1 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to
 2 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the
 3 truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion
 4 for preliminary injunction. (Pltfs.' Reply, 7:17-22.);

5. Plaintiffs' Exhibit 7 to their Request is not properly subject to judicial notice under
 6 Rule 201 of the Federal Rules of Evidence. Exhibit 7 purports to be an incomplete portion of a
 7 transcript of court proceedings held on November 14, 2005, in a Northern District of Illinois
 8 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to
 9 acknowledge the existence of an incomplete portion of the transcript of a different court, but cite
 10 the contents thereof for the truth of the matter asserted therein as providing evidentiary support
 11 for Plaintiffs' present motion for preliminary injunction. (Pltfs.' Reply, 9:6-12.);

12. Plaintiffs' Exhibit 8 to their Request is not properly subject to judicial notice under
 13 Rule 201 of the Federal Rules of Evidence. Exhibit 8 purports to be a declaration and attached
 14 exhibit from an individual not a party to the present action, filed in a Northern District of Illinois
 15 lawsuit in which the State was not a party. Plaintiffs do not merely ask this Court to
 16 acknowledge the filing of the declaration in the Illinois court, but cite the contents thereof for the
 17 truth of the matter asserted therein as providing evidentiary support for Plaintiffs' present motion
 18 for preliminary injunction. (Pltfs.' Reply, 7:17-22.).

19 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS
 TO REQUEST FOR JUDICIAL NOTICE**

21 The State submits the following memorandum of points and authorities in support of their
 22 objections to Plaintiffs' Request for Judicial Notice.

23 **INTRODUCTION**

24 For the first time through their reply papers, Plaintiffs attempt to introduce incomplete
 25 hearing transcripts, that do not even identify the witness, and various declarations purportedly
 26 from the files of another federal court in a different jurisdiction concerning a lawsuit in which
 27 neither the State, nor any other defendants, were parties or privy to the action, and which dealt
 28 with a separate and distinct law from that at issue here. Plaintiffs ask this Court to take judicial

1 notice of these materials, not to establish the existence of the filing of these materials in another
 2 court, but to introduce the contents thereof as evidence in the instant case. Not only is this
 3 attempt improper because the contents of these materials cannot be considered “adjudicative
 4 facts” subject to judicial notice under Rule 201, but the contents of these materials constitute
 5 textbook hearsay which are not admissible for any purpose. Instead of attempting to properly
 6 introduce evidence to support their claims through their moving papers as required, Plaintiffs
 7 attempt to sneak this material in for the first time through their reply papers under the guise of a
 8 request for judicial notice. Plaintiffs’ attempt must fail, as under no circumstances can the
 9 contents of these incomplete transcripts and declarations be considered “adjudicative facts”
 10 subject to judicial notice by this Court.

11 **I. The Contents of Transcripts of Proceedings and Declarations Filed In Another
 12 Court Are Not Properly Subject to Judicial Notice.**

13 Plaintiffs ask this Court to take judicial notice of the contents of incomplete portions of
 14 transcripts of proceedings held in an Illinois lawsuit in which the State was not a party. They
 15 also ask this Court to judicially notice certain declarations submitted to that court. The sole
 16 purpose of Plaintiffs’ request is to attempt to introduce into evidence material that Plaintiffs
 17 contend support their position in the present motion for preliminary injunction. Plaintiffs cite to
 18 these out of court transcripts and declarations as if they somehow constitute admissible evidence
 19 before this Court. But Rule 201 only provides for the taking of judicial notice of an
 20 “adjudicative fact.” And the only adjudicative fact properly subject to judicial notice is “one not
 21 subject to reasonable dispute in that it is either (1) generally known within the territorial
 22 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to
 23 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid., 201, subd. (b). The
 24 out of court statements contained in these transcripts and declarations do not meet the definition
 25 of adjudicative facts, and are therefore not properly subject to judicial notice.

26 In the Ninth Circuit, it is well established that “[a]s a general rule, a court may not take
 27 judicial notice of proceedings or records in another cause so as to supply, without formal
 28 introduction of evidence, facts essential to support a contention in a cause then before it.” *M/V*

1 *American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983);
 2 *accord, Wyatt v. Terhune*, 315 F.3d 1108, 1114 n. 5 (9th Cir. 2003) (factual findings in one case
 3 not admissible for their truth in another case through judicial notice); *Pollstar v. Gigmania LTD.*,
 4 170 F. Supp. 2d 974, 978-79 (E.D. Cal. 2000) (“Because there is no authority for judicial notice
 5 of pleadings in an unrelated case, the court declines to take judicial notice of the [other court]
 6 pleadings.”)

7 This established Ninth Circuit rule is consistent with the leading treatises on the Federal
 8 Rules of Evidence. “[A] court may not take judicial notice of the truth of an evidentiary record
 9 in another action tried in the same court where there is no conclusive affect to the judgment
 10 noticed It is not permissible to bind a party a party to the evidence in that record except
 11 where the party was joined in or privy to the action. Furthermore, although a court may take
 12 judicial notice of a prior proceeding, a court cannot take judicial notice of the testimony given at
 13 that prior proceeding, as such testimony is hearsay.” 29 Am. Jur. 2d, Evidence § 134 (Aug.
 14 2005) (internal footnotes omitted); *see also*, 21B Fed. Prac. & Proc., Evidence 2d § 5106.4 (“It
 15 seems clear that a court cannot notice pleadings or testimony as true simply because these
 16 statements are filed with the court.”); 31A C.J.S. Evidence, § 58 (June 2005).

17 The cases cited by Plaintiffs do not support their request, as the evidentiary submissions
 18 admitted in both *Biggs* and *Mullis* were part of the underlying matters directly at issue in those
 19 cases. *Biggs v. Terhune*, 334 F.3d 910, 915 n.3 (9th Cir. 2003) (judicial notice of transcripts of
 20 plaintiff’s hearing before the Board of Prison Terms for purposes of reviewing Board’s
 21 evidentiary basis for conclusions reached after hearing); *Mullis v. United States Bank. Ct.*, 828
 22 F.2d 1385, 1388 n.9 (9th Cir. 1987) (judicial notice of “pleadings, orders and other papers on file
 23 in the underlying bankruptcy case.”) Here, by stark contrast, Plaintiffs request that unrelated
 24 evidence from an out of state lawsuit in a different jurisdiction in which the State was not a party
 25 be admitted as evidence for purposes of supporting the factual basis of their claim. No case law
 26 supports Plaintiffs’ request.

27 Plaintiffs ask this Court to judicially notice incomplete transcripts and declarations submitted
 28 to an Illinois court not for the purpose of establishing the existence of such records, but for the

1 sole purpose of citing the contents of such records for improper evidentiary purposes. Instead of
 2 attempting to properly introduce evidence to supports their claims through their moving papers,
 3 Plaintiffs seek an end-run around the rules of evidence. But Rule 201 is not a loophole in the
 4 proper evidentiary procedure. The contents of the incomplete transcripts and declarations cited
 5 by Plaintiffs are not “adjudicative facts” properly subject to judicial notice under any
 6 circumstance. Therefore, the State respectfully requests that Plaintiffs’ Request for Judicial
 7 Notice be denied as to Exhibits 3 through 8, and that the citations to these exhibits be stricken
 8 from the record.

9 **II. The Contents of The Incomplete Transcripts and Declarations Cited By**
Plaintiffs Constitute Inadmissible Hearsay.

10 Plaintiffs cite to the contents of these incomplete transcripts and declarations in an effort to
 11 rebut the State’s properly submitted evidence, contained in the legislative record, demonstrating that
 12 the State Legislature was presented with substantial evidence that playing extremely violent video
 13 games can be harmful to minors. Instead of citing to the legislative record to examine the evidence
 14 considered by the Legislature in support of AB 1179, Plaintiffs attempt to introduce testimony
 15 purportedly submitted to a federal court in Illinois regarding a separate and distinct video game law,
 16 with separate and distinct defendants. Of course Plaintiffs do not, as they cannot, claim that the
 17 California Legislature considered such material in passing the law at issue here. Instead, Plaintiffs’
 18 sole purpose in attempting to introduce these incomplete transcripts and declarations is to cite them
 19 for the truth of the allegations asserted therein – black letter hearsay. Because the contents of these
 20 materials constitute hearsay, Plaintiffs’ Request for Judicial Notice should be denied and Plaintiffs’
 21 citation to these materials stricken from the record.

22 Rule 801 of the Federal Rules of Evidence defines hearsay as “a statement, other than one
 23 made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth
 24 of the matter asserted.” Hearsay is not admissible absent an applicable exception. Fed. R. Evid., R.
 25 801. No possible exception to the hearsay rule applies in the instant case.

26 The statements contained in Exhibits 3 through 8 each meet the definition of hearsay, as not
 27 a single one was made while testifying before this Court. Because the sole purpose of Plaintiffs’

1 attempt to introduce Exhibits 3 through 8 to the Court is to prove the truth of the allegations
2 contained therein, each constitutes inadmissible hearsay. Therefore, the State respectfully requests
3 that Plaintiffs' Request for Judicial Notice be denied as to Exhibits 3 through 8 and Plaintiffs' citation
4 to these materials be stricken from the record.

5 **CONCLUSION**

6 For all of the foregoing reasons, the State respectfully requests that Plaintiffs' Request for
7 Judicial Notice be denied as to Exhibits 3 through 8 and Plaintiffs' citation to these materials be
8 stricken from the record.

9
10 Dated: December 1, 2005

11
12 Respectfully submitted,
13 BILL LOCKYER
Attorney General of the State of California
14 LOUIS R. MAURO
Senior Assistant Attorney General
15 CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General
16 SUSAN K. LEACH
Deputy Attorney General
17

18
19 /s/ Zackery P. Morazzini
20 ZACKERY P. MORAZZINI
Deputy Attorney General
21 Attorneys for Defendants
22 Governor Arnold Schwarzenegger and Attorney
General Bill Lockyer
23
24
25
26
27
28